

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 14, 2006

FRANKLIN LEDBETTER v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Marion County
No. 5311/7155 Thomas W. Graham, Judge

No. M2005-01704-CCA-R3-PC - Filed July 6, 2006

Following a jury trial, Petitioner, Franklin Ledbetter, was convicted of incest and rape of a child. For the rape of a child conviction, Petitioner was sentenced as a Range I offender and ordered to serve twenty-three years at one hundred percent. For the incest conviction, Petitioner was sentenced to eight years as a Range II, multiple offender. The sentences were ordered to be served concurrently, for an effective twenty-three year sentence. Petitioner was also fined fifty thousand (\$50,000) dollars for the rape of a child conviction and ten thousand (\$10,000) dollars for the incest conviction. On direct appeal, this Court affirmed those convictions. Petitioner then filed a petition for post-conviction relief which the trial court subsequently denied. In this appeal, Petitioner challenges the trial court's denial of his petition for post-conviction relief arguing that his trial counsel provided ineffective assistance of counsel in that he (1) failed to properly prepare for trial, including failing to call witnesses, (2) failed to challenge the victim's credibility, and (3) failed to properly challenge the medical proof introduced at trial. The judgment is affirmed.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which and DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

John H. Cameron, Jr.; Jasper, Tennessee, (on appeal); Philip Condra, District Public Defender; and Jeffrey Harmon, Assistant Public Defender, for the appellant, Franklin Ledbetter.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; James Michael Taylor, District Attorney General; Sherry Gouger; Assistant District Attorney; and Julia Oliver, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The facts as set forth by this court on direct appeal are as follows:

On June 13, 2000, the victim, ML, stayed with the defendant, who was her father, at her grandmother's home, while her mother and grandmother worked. The victim testified that, at some point during the day, she was watching television when the defendant "took [her] in the dining room and put a sock in [her] mouth." The defendant then carried the victim into her mother's bedroom and laid her on her back on the floor. Thereafter, the defendant sat on the victim's stomach, unzipped his pants, and "stuck his privates in [the victim's] mouth and peed." The victim also said that the defendant told her not to tell anyone what had happened; however, the victim informed her grandmother of the sexual abuse as soon as she returned home from work.

[footnote omitted].

The victim's grandmother, Debra Layne, testified that on June 13, 2000, she and her daughter, the victim's mother, left for work at 6:00 a.m., leaving the victim and her sister in the care of the defendant. Layne's husband and other children also lived in the home at that time. When Layne returned home from work at 4:00 p.m., the victim did not greet her at the car, which was unusual. After learning from the defendant that the victim was at a neighbor's, Layne summoned the victim home. The defendant and one of Layne's sons left to go pick up the victim's mother from work. After speaking with the victim, Layne took her and her sister to the police station, where they were referred to the Department of Human Services ("DHS"). Layne later accompanied the victim, the victim's sister, and their mother to T.C. Thompson Children's Hospital, where the victim was examined.

The victim's mother, Holly Sanders, testified as Layne did, that she left the victim in the care of the defendant, while she and Layne went to work on June 13, 2000. Sanders' stepfather, three brothers, and youngest sister were also at the house when she left for work that morning. When she returned home from work around 6:30 p.m., an officer came to the residence. After speaking with this officer, Sanders went to the DHS, where she met Layne and the victim. Thereafter, Sanders drove the victim to T.C. Thompson Children's Hospital, where she was examined by Kevin Mounce, a licensed physician's assistant.

Finally, the State called Kevin Mounce to testify. Mounce stated that he examined the victim on June 13, 2000, at approximately 11:00 p.m. and found edema (swelling) on her lower lip and discoloration in the middle of her lower lip resembling early bruising.

After the prosecution put on its proof, the defendant called Colette Young and Taffy Wilson as witnesses. Young, a forensic interviewer for the Children's Advocacy Center of Hamilton County, testified that she interviewed the victim on

June 15 and 16, 2000. Wilson, a child protective services investigator with the Marion County Department of Children's Services ("DCS"), testified that the victim's grandmother brought the victim to the DCS around 5:30 p.m. on the day of the incident. The victim's mother and Officer Gene Hargis later came to the DCS.

Next, the defendant called Detective Gene Hargis of the Marion County Sheriff's Department who testified that he was present at the DCS with the victim, Sanders, and Layne. The victim's clothing was subsequently collected and sent to the Tennessee Bureau of Investigation Crime Laboratory.

The defendant then recalled Mrs. Layne who said that, approximately one week after the June 13, 2000, incident, the victim told her that on the date in question she was mad at her father because he would not let her go swimming. The defendant testified that he often babysat the victim and her sister while their grandmother and mother worked, and he was babysitting them on June 13, 2000. Sanders' stepfather and brother were at the house that day, as well. He recalled the victim throwing a tantrum that day because he did not allow her to go swimming. The defendant denied all allegations of sexual abuse and also denied putting a sock in the victim's mouth. He further testified that he was not aware that anything unusual had happened that day until a police officer arrived at the Layne home and asked him to vacate the premises. The defendant admitted having a prior felony theft conviction.

State v. Frankie Ledbetter, No. M2002-02125-CCA-R3-CD, 2003 WL 21877667, *1 -2 (Tenn. Crim. App.2003).

II. Post-Conviction Hearing

At the post-conviction hearing, Petitioner testified that in the fourteen months between his arrest and his trial, he met with his trial counsel approximately four times and received approximately three letters from him. Petitioner first met with trial counsel in July 2001 for approximately thirty minutes. They met two more times at the county jail where Petitioner was incarcerated for two months for a separate offense. A final meeting occurred at trial counsel's office one week prior to Petitioner's trial and lasted approximately two hours.

Petitioner said it was his estimate that he and his trial counsel met for a total of approximately three and one half hours. Petitioner admitted that when he first met with his trial counsel, counsel went into "great detail" regarding the charges, legal issues, and the possible trial scenarios. Petitioner's trial counsel explained to him the severity of the charges against him. Petitioner understood that he was being charged with a Class A felony and that a conviction could result in a significant amount of mandatory jail time. Petitioner's trial counsel discussed the difficulty in conducting a trial with small children as witnesses. He said that trial counsel talked to him about "what might be put into a child's mind."

On cross-examination, Petitioner admitted that from the time of his arrest in June 2000, until the time of his trial in August 2001, there was never a time when his trial counsel refused to see him. He said that he did not go to trial counsel's office to see him or discuss his case unless it was a scheduled appointment. Petitioner said that both he and his mother tried to contact his trial counsel, but he was either out of the office or in court when the calls were made. He admitted that if his trial counsel was present in the office, he would accept Petitioner's phone calls. He also admitted that the letters his trial counsel sent him concerned the urgency in setting up an appointment to discuss his case, as well as the settlement offer made by the State. He admitted that he did not immediately contact his trial counsel upon receiving these letters. Petitioner's trial counsel never missed or cancelled a scheduled meeting.

Petitioner said that he spoke with his trial counsel about the State's plea offer, but he declined to accept the offer because he was not guilty. He said that he never spoke with his trial counsel about the specific offer of ten years, just the fact that an offer had been made. Petitioner's trial counsel explained the consequences of rejecting the offer, and Petitioner said that he understood the consequences but chose to proceed with a jury trial. He did not recall if his trial counsel discussed the definition of penetration with him as related to the charges against him.

Petitioner told trial counsel that on the day the incident occurred, he and the victim's uncle, Fred Allen Sanders, a.k.a. Bo Sanders, had been at the house all day babysitting the victim and two other children. Mr. Bill Layne, the victim's grandfather, was also present at the residence on the day of the incident. Petitioner said that he was inside the house with the victim the entire day. The front door was open all day. Except for a thirty-minute time period during which Mr. Sanders went to the auto parts store, one or both of these men were present at the house with Petitioner and the children throughout the day. Petitioner was aware of how long Mr. Sanders was away from the residence because he was waiting on his return so that he could step outside and "smoke a joint."

Petitioner described Mr. Layne as an older man who "heard what he wanted to hear and didn't hear what he didn't want to hear." He said that Mr. Layne drank alcohol on a daily basis and he was drinking the day of the incident. He kept beer in his truck and would sit outside the house in his truck and drink the beer. On the day of the incident, Mr. Layne was in and out of the house, spending the outside time in his truck, but "[h]e was never gone for long periods of time." Mr. Sanders, who was approximately eighteen years old, worked on his van outside the house the majority of the day of the incident.

Petitioner did not instruct his trial counsel to speak with Mr. Layne or Mr. Sanders regarding Petitioner's whereabouts on the day of the incident. However, his trial counsel told him that his investigators had spoken with both Mr. Layne and Mr. Sanders about what transpired on the day of the incident. Neither of the men were called to testify as witnesses at the trial. Petitioner said that he was aware that his trial counsel met with Debra Layne at her residence on several occasions. His trial counsel also met with Holly Sanders and Bill Layne at the residence. Petitioner was not aware of any problem between himself and these individuals precluding their cooperation with his defense.

Petitioner told his trial counsel that his penis was nine inches long, and that he had a piercing in his penis. The piercing was a gold hoop which he wore every day, including the day of the incident. Petitioner thought that the size of his penis and the presence of the piercing were relevant as to whether he committed the crime. He assumed that trial counsel would bring the size of his anatomy to the trial court's attention, but he did not instruct him to do so. There was no discussion regarding the size of his penis or his piercing during the trial, and the victim was not asked to describe Petitioner's genitalia.

Petitioner told trial counsel that there was pornography in the home and that the pornography was available to the victim. There was no discussion about the pornography at trial, but Petitioner thought his trial counsel should have introduced this evidence to demonstrate that the victim had knowledge of sexual acts. On cross-examination, Petitioner admitted that he never told his trial counsel that the victim had actually viewed pornography, but said, "I mean I'm sure she walked by and seen it on, I mean me and Bo watched it when we's getting high and me and Holly watched it at night and you know . . . it's a ninety (90) percent possibility that she seen it." The victim did not tell Petitioner that she had seen pornography, nor did anyone else tell him that she had seen it.

According to Petitioner, there were inconsistencies in the victim's story and her story changed as the trial approached. He said that he pointed out these inconsistencies to his trial counsel, but counsel did not explore the inconsistencies. Petitioner also said that Debra Layne, the victim's grandmother, and Holly Sanders, the victim's mother, told him that the doctors who examined the victim at the hospital said "this child has not been touched." Petitioner said that he relayed this information to his trial counsel.

Petitioner did not know the names of the doctors who conducted the examination of the victim at T.C. Thompson's Children's Hospital. He said that he and his trial counsel never discussed the fact that the doctors found no evidence of vaginal penetration, anal penetration, or oral penetration. Petitioner said that his trial counsel never talked to him about any bruising around the victim's mouth, and he did not know the victim's mouth was bruised until the pediatric nurse practitioner testified about the bruises at trial. Petitioner said that prior to the post-conviction hearing, he had not seen the medical report from the victim's initial examination.

Petitioner said that on the day of trial, Ms. Layne and Ms. Sanders told him that the State wanted them to lie during their testimony. Petitioner instructed the women to tell the truth and then told his trial counsel what they had related to him. Petitioner said that trial counsel "shrugged it off . . . like they wasn't nothing."

Debra Layne testified that on the day of the incident, the victim told her that Petitioner put his penis in her mouth and "peed." Ms. Layne took her to the police station and then to the hospital. According to Ms. Layne, the doctors did not indicate that they found bruising on the victim's lips or mouth. Ms. Layne said that she asked the nurse to check the victim's lips because she noticed that the victim had been biting her lips. She could not remember if the victim's mouth was bruised, but recalled that it was "puffy."

Ms. Layne and her daughter took the victim to the Department of Children's Services where she was interviewed regarding the abuse. Ms. Layne said that she was not present during the interview, but she was told that when the victim was asked a question about the abuse, she would respond, "ask granny." Ms. Layne explained that the victim always wanted Ms. Layne to tell the story about what happened.

Ms. Layne testified that she told Petitioner's trial counsel that the victim had seen pornographic videos at the residence. She explained that following the incident, she learned that the victim had walked into a room where Mr. Sanders was watching a pornographic videotape. She did not know how much of the tape the victim observed. Ms. Layne did not initially report this fact to the police or the hospital because she was not aware that it had happened until approximately two weeks after the incident occurred.

Ms. Layne said that after the trial, Petitioner's trial counsel came to the residence on three different occasions to speak with the witnesses. Prior to trial, only trial counsel's investigators came to the house to question the witnesses. Ms. Layne was not personally aware of anyone that Petitioner's trial counsel had questioned other than her daughter Crystal. During these interviews, Ms. Layne told Petitioner's trial counsel that the victim had made inconsistent statements about what happened. Petitioner's trial counsel did not question Ms. Layne about these inconsistencies at trial. On cross-examination, Ms. Layne admitted that although the victim's story had changed, she never denied that the incident took place.

Ms. Layne said that the situation was difficult on everyone, but she and her family cooperated with the State and with defense counsel as much as possible. She said that she had more interaction with the district attorney's office than with Petitioner's trial counsel. She also said that on the day of trial she felt intimidated and that the district attorney's office was coaching her about how to testify. She expressed those fears to Petitioner immediately prior to trial.

Terry Lynn Wise, Petitioner's sister, testified that she provided her brother's primary transportation to court and to meetings with his attorney. She said that Petitioner asked her for a ride to see his lawyer only on scheduled appointment dates. Ms. Wise took Petitioner to meet with his trial counsel on two occasions shortly before trial. The meetings each lasted approximately thirty minutes. Ms. Wise attended one of these meetings during which Petitioner disclosed the size of his penis to his attorney, as well as the fact that his penis was pierced with a ring. Ms. Wise was not aware of any unscheduled meetings between Petitioner and his trial counsel. She did not testify at trial.

Petitioner's trial counsel testified that he had served as District Public Defender for the 12th Judicial District since 1989. After being appointed as Petitioner's attorney, he sent Petitioner a letter expressing the necessity of setting up an appointment as soon as possible. He could not recall how much time he spent discussing the case with Petitioner in face-to-face meetings. He said that the time sheets in Petitioner's file were not indicative of the total amount of time he spent working on the case. The sheets only provided an account of the time spent in meetings with Petitioner.

Petitioner's trial counsel explained that when he gets a new client, the first thing he generally does is read the indictment against his client. He then determines the potential range of punishment and the possible fines and explains these facts to his client. He then has the client explain what happened, when he or she was contacted by the police, and when he or she became aware of the charges. He said that he conducts a "very thorough initial interview on areas that [he] think[s] are going to be involved in the particular indictment." Prior to trial, he conducts a "trial prep" with his clients, going over the various aspects of the case, what to expect at trial, and courtroom conduct.

In this particular case, Petitioner's trial counsel carried out his typical meetings and trial preparation with Petitioner. Trial counsel spoke with some of the witnesses, including the victim's grandmother, mother, and sister. He also had his investigators photograph the scene and interview witnesses and neighbors, then report back with their findings. He said that neither he nor his investigators interviewed Mr. Sanders.

Petitioner's trial counsel said that he initiated the discussion with Petitioner about the size of Petitioner's penis. He explained that the victim made some initial allegations of anal sex, and when these types of allegations were made, it was his practice to question his clients regarding their genitalia. He said that in light of Petitioner's answers to these questions, he felt that introducing the information at trial would be more harmful than helpful to Petitioner's defense. Specifically, he was afraid that the jury would associate Petitioner's size and ring piercing with the bruising and puffiness on the victim's mouth. Trial counsel said that although the medical report indicated edema and swelling on the victim's lips, the physician's assistant could not testify as to what specifically caused the bruising, and there was no other physical evidence that oral sex caused the injury. He did not want to provide the prosecution a theory for the cause of the bruising and therefore avoided any discussion about Petitioner's anatomy.

Trial counsel did not investigate the witnesses' claims that the doctors found no evidence of sexual abuse. He initially said that it was his understanding that it was a physician's assistant, not a doctor, who conducted the initial medical exam. He then explained that where oral sex is the issue, there is often no physical evidence for a doctor to find. Ultimately, resolution of the case would hinge on whether the jury believed the victim and he did not find it necessary to call a doctor to say that there was no evidence of oral sex since that fact was not dispositive of the issue. He said that he first learned that Ms. Layne had seen the victim biting her lip at the post-conviction hearing.

Trial counsel said that he felt there were three possible theories of defense. He said that the situation presented two gainfully employed women living in a house with at least three unemployed males. In light of this fact, his first theory was that Ms. Layne wanted Petitioner out of the home and consequently had motive to coerce the victim into saying Petitioner had sexually abused her. His second theory was that the victim made up the story in retaliation against Petitioner. In support of this theory, trial counsel explained that on the day of the incident, the two other children in the house had been allowed to go swimming, but Petitioner did not allow the victim to go. In response, the victim "threw a tantrum" and was upset with Petitioner. His final theory was that the victim's memory did not coincide with the actual circumstances as they existed in the home. He noted

several instances in which the victim's statements did not correspond with what he and the investigators knew to be true from the information provided by the adults.

Petitioner's trial counsel said that no alibi evidence was introduced because there was never any statement from Petitioner that he was not there when the incident occurred. He said that there was no evidence or witness testimony to show that Petitioner was not left alone with the victim at any time. He said he looked at the list of potential state witnesses, as well his own possible witnesses and made a careful determination about who he would subpoena to testify based on who would be helpful to the case. He reiterated that he did not call Mr. Sanders or Mr. Layne to testify because there was no indication that the testimony of these witnesses would be helpful to Petitioner's case. Petitioner's trial counsel did not think the outcome of the case would have been different if these witnesses had testified.

Petitioner's trial counsel said that he did what he thought was in the best interest of his client and he made his trial decisions in the best way he knew how. He explained that child sex abuse cases are some of the most difficult cases and he took special steps to select an impartial jury and to give Petitioner the fairest trial possible. He said that he followed up with Ms. Layne regarding her statements that she felt pressured to lie during her testimony, but his questioning did not elicit any solid evidence supporting her claims. He said he would certainly have brought this issue to the court's attention had there been any evidence in support of her statements.

Finally, Petitioner's trial counsel said that it was his style to take his time and make sure that he was fully prepared for trial and that he was not rushed into making a mistake and damaging his client's case. He said that had he felt it were necessary, he would certainly have filed a motion in the present case requesting more time to prepare for trial. He said that the case hinged on whether the jury believed the victim's testimony or Petitioner's testimony. He did his best to draw attention to the child's factual inaccuracies and to get her to admit that perhaps things did not happen the way she remembered. He used the trial strategy that he found to be in the best interest of his client.

The trial court affirmed Petitioner's conviction, finding that Petitioner did not receive ineffective assistance of counsel. This appeal followed.

III. Analysis

On appeal, Petitioner argues that his trial counsel provided ineffective assistance of counsel in that he (1) failed to properly prepare for trial, including failing to call witnesses, (2) failed to challenge the victim's credibility, and (3) failed to properly challenge the medical proof introduced at trial.

In a post-conviction proceeding, the petitioner has the burden of proving his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed

questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a *de novo* standard with no presumption of correctness. *Id.* at 457.

This court reviews a claim of ineffective assistance of counsel under the standards of *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975) and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996); *Butler v. State*, 789 S.W.2d 898, 899 (Tenn. 1990). The failure to prove either deficiency or prejudice justifies denial of relief; therefore, the court need not address the components in any particular order or even address both if one is insufficient. *Goad*, 938 S.W.2d at 370. In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

The test in Tennessee to determine whether counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *State v. Honeycutt*, 54 S.W.3d 762, 769 (Tenn. 2001). Therefore, in order to prove a deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Honeycutt*, 54 S.W.3d at 768. The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997); *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

A. Failure to Prepare for Trial

Petitioner first contends that trial counsel failed to properly prepare for trial because he failed to conduct more than four face-to face meetings with Petitioner and failed to call certain witnesses to testify at trial. The proof showed that in the year preceding Petitioner's trial, he met with his trial counsel approximately four times and received three letters from counsel prior to trial. Petitioner admitted that during these meetings, trial counsel explained the severity of the charges against him, the potential punishment, the State's plea offer, and the consequences of rejecting the State's offer.

He likewise explained the difficulty in conducting a trial with a child witness and the likelihood of a conviction. Petitioner testified that he understood the charges against him and the risk he took in rejecting the State's plea offer. He said that his trial counsel never refused to see him, never declined his phone calls, and never missed or cancelled a scheduled appointment. Petitioner also admitted that although his trial counsel sent a letter urging him to schedule an appointment as soon as possible, he did not immediately do so. There was no evidence offered at the post-conviction hearing to show that further face-to-face meetings would have changed the outcome of the trial.

Petitioner also argues that although his trial counsel was aware that other individuals were present at the residence on the day of the incident, he failed to call them as witnesses at trial. The testimony at the post-conviction hearing established that those witnesses, Mr. Layne and Mr. Sanders, were not in the presence of Petitioner and the victim at all times of the day. Indeed, for much of the day, both of the individuals were outside the house while Petitioner and the victim remained inside the house. Petitioner admitted that Mr. Layne could not hear well and drank beer each day, including the day of the incident. Petitioner also said that there was a thirty-minute time period during which Mr. Sanders was not at the residence. The witnesses were not called to testify at the post-conviction hearing regarding what their testimony would have been at trial. *Black v. State*, 794, S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). Further, no evidence was introduced to show how the testimony of these witnesses would have changed the outcome of the trial. *Id.*

The post-conviction court found Petitioner was free on bond for approximately one year preceding his trial. During that time, Petitioner had four face-to-face meetings with trial counsel and on three occasions received written correspondence. The court found no evidence to suggest that additional face-to-face conduct would have changed the outcome of the trial, nor was there evidence that trial counsel refused to meet with Petitioner or fulfill the obligations of his representation. Consequently, the post-conviction court found that trial counsel's performance was not deficient.

The post-conviction court also found that neither Mr. Layne nor Mr. Sanders could provide testimony excluding the possibility that Petitioner sexually abused the victim. The court noted that neither of these witnesses were continuously present in the home and there were "negative factors about both that could well have hurt the Petitioner's case." The court found that trial counsel's failure to call these witnesses "was not error and even if it was, it could not call into question the ultimate outcome of the trial."

We conclude that there is nothing in the record to preponderate against the trial court's findings. Petitioner is not entitled to relief on this issue.

B. Failure to Challenge Victim's Credibility

Petitioner argues that trial counsel was ineffective in that he failed to challenge the victim's credibility by raising the issue of her inconsistent statements and her inability to describe Petitioner's genitalia. The proof showed that Petitioner told his trial counsel that his penis was nine inches in length and that it was pierced with a gold loop; the victim's mouth was bruised and "puffy" on the

day of the incident; no medical personnel could testify as to what specifically caused the bruising on the victim's lips; and trial counsel made a strategic choice not to introduce evidence regarding Petitioner's genitalia because he did not want to provide the prosecution with a good theory for the cause of the victim's injuries. Trial counsel also testified that it was a strategic decision to show the inconsistency in the child's statements through the testimony of other adult witnesses rather than directly attacking the victim's testimony through an aggressive cross-examination.

The post-conviction court found that the testimony regarding Petitioner's genitalia was potentially more prejudicial than helpful in his attempt to prove that the victim did not perform oral sex on Petitioner. There was also no evidence to suggest that trial counsel was deficient in choosing to impeach the victim's credibility through adult testimony rather than through cross-examination of the victim. The post-conviction court found that trial counsel's actions were sound, strategic decisions that did not fall below the standard expected of attorneys in criminal trials. We agree with the trial courts findings. Petitioner is not entitled to relief on this issue.

C. Failure to Challenge Medical Evidence

Finally, Petitioner contends that trial counsel was ineffective in failing to challenge the medical proof from the victim's initial medical examination. The proof at the post-conviction hearing was that Ms. Layne, the victim's grandmother, had taken the victim to the hospital for a medical examination. Testimony established that the doctors found no evidence of oral, vaginal or anal penetration, and did not report bruising or swelling on the victim's lips. Ms. Layne testified that she asked the nurse to look at the victim's lips because she noticed the victim had been biting her lips. It was at this point that the nurse discovered the bruising.

Petitioner's trial counsel testified that he did not know the victim had bitten her lips until Ms. Layne testified to this fact at the post-conviction hearing. He first said that to his knowledge there were no doctors, only a physician's assistant, who conducted the examination. He said that he did not find it necessary to further investigate whether the doctors found evidence of sexual abuse or bruising to the lips. He explained that the evidence available could only support a claim of oral sex, and typically there is no physical evidence when the issue is whether oral sex occurred. Consequently, he felt that resolution of the case would depend on whether the jury believed the victim's testimony that Petitioner forced her to perform oral sex, not whether the doctor found evidence of such abuse. Therefore, he did not pursue a challenge to the medical evidence.

The post-conviction court found that trial counsel was not deficient in failing to challenge the medical testimony. The court found that medical personnel could not have testified as to whether oral sex occurred. Further, there was no evidence introduced to show that had trial counsel chosen to challenge the medical evidence, the outcome of the trial would have been different. Consequently, the post-conviction court found that this issue was without merit. We agree with the trial court's finding. Trial counsel was not deficient in failing to challenge the medical evidence. Petitioner is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE